NAM FATT CORPORATION BHD & ANOR A

v.

PETRODAR OPERATING CO LTD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
LEE SWEE SENG JC
[SUIT NO: S-22-315-2010]
28 SEPTEMBER 2010

ARBITRATION: *Stay of proceedings - Mandatory stay - Principles applicable - Right to apply - Step taken in proceedings - Defendant filing unconditional appearance and affidavit in reply to ad-interim injunction - Whether defendant had taken a step in proceedings - Whether defendant deprived of right to invoke s. 10 Arbitration Act 2005 for mandatory stay* C

CIVIL PROCEDURE: *Jurisdiction - Filing of unconditional appearance and affidavit in reply to ad-interim injunction - Whether amounted to submission to jurisdiction* D

CIVIL PROCEDURE: *Jurisdiction - Forum conveniens - Proper forum for case to be tried - Whether Malaysian or Sudan courts - Sudanese law to be proper law of contract - Whether Malaysia nevertheless natural forum for trying action - Whether prayers in writ had real and substantial connection with Malaysia - Whether unjust to compel plaintiffs to sue in Sudan* E

CIVIL PROCEDURE: *Injunction - Temporary injunction - Ad-interim injunction - Application to set aside - Whether serious questions shown - Whether question raised frivolous or vexatious - Whether ad-interim injunction to remain until inter partes hearing of interim injunction* F

CIVIL PROCEDURE: *Service - Foreign defendant - Service of writ of summons abroad - Whether O. 11 Rules of the High Court 1980 complied with - Whether service constituted good service of notice of writ* G

CIVIL PROCEDURE: *Writ of summons - Setting aside - Service - Foreign defendant - Service of writ of summons abroad - Setting aside - Whether O. 11 Rules of the High Court 1980 complied with - Whether service constituted good service of notice of writ* H

The second plaintiff was a subsidiary of the first plaintiff. The 2nd plaintiff had entered into a contract with the 1st defendant to build, I construct and commission a one thousand kilometer pipeline and pumping facilities for the passage of crude oil through it for an

agreed contract sum of US$180 million ('the project') through the vehicle of a joint-venture company. The 1st defendant was an off-shore company incorporated in British Virgin Islands and having its office in Khartoum. The 2nd defendant is an off-shore bank in Labuan with a place of business in Kuala Lumpur. The 1st plaintiff had at the request of the second plaintiff provided the 2nd defendant with the necessary security for the issuance of a Performance Guarantee ('PG') for US$18 million in favour of the first defendant. The parties had agreed that Sudan law shall be the applicable law governing the contract as well as the PG. The project was substantially completed but the 2nd plaintiff complained about repeated attempts to delay and drag the payments due to them from the 1st defendant. There was also the complaint that the 1st defendant had refused to approve any variation order even though those variations were at the orders of the 1st defendant. When things came to the hilt the 1st defendant made a demand on the 2nd defendant to pay the sum of US$18 million under the PG. The plaintiffs quickly filed a writ and statement of claim against the defendants in the Kuala Lumpur High Court. The plaintiffs also applied for an injunction to restrain the 1st defendant from receiving the money under the PG and the 2nd defendant bank from paying to the 1st defendant as beneficiary under the PG. An *ex parte* injunction was granted to restrain the 1st defendant from receiving the money under the PG. Pursuant to leave granted by the court, the plaintiffs then served the *ex parte* injunction order and the related cause papers on the 1st defendant out of jurisdiction. The 1st defendant filed a conditional appearance and applied for the leave granted to serve the writ out of jurisdiction to be set aside and also for a stay of proceeding pending reference to arbitration. Meanwhile the High Court had granted an ad interim injunction to preserve the *status quo* until the disposal of the *inter partes* hearing of interim injunction. The 1st defendant filed and served an affidavit-in-reply to oppose the interim injunction application on the merits. The issues arising for determination were as follows: (i) Whether the 1st defendant had submitted to the jurisdiction of the court; (ii) Whether the Malaysian courts were the *forum conveniens*; and (iii) Whether a stay should be granted pursuant to s. 10 of the Arbitration Act 2005.

Held:

(1) The 1st defendant's affidavit in objecting to the ad-interim injunction had clearly stated that the application was made without prejudice and subject to the 1st defendant's application

to set aside the service of the writ out of jurisdiction. The 1st defendant had not submitted, succumbed nor surrendered to the jurisdiction of the court merely because they had objected to the ad-interim injunction. (para 30)

(2) The Malaysian Courts can have jurisdiction statutorily over a foreign defendant under O. 11 r. 1 of Rules of the High Court 1980 ('RHC 1980'), as jurisdiction is implicit in the power to grant leave for service out of jurisdiction. The present action fell within O. 11 r. 1(1)(iii)(i) of the RHC 1980, and was a proper case for service out of jurisdiction. The plaintiffs' case of fraudulent demand was cast as a tort committed within the jurisdiction, and the Malaysian Court also had jurisdiction under O. 11 r. 1(1)(iii)(h) of RHC 1980. Further, since the action could also be brought against the 2nd defendant, a Malaysian company and since the 2nd defendant had entered an appearance, the action also fell within O. 11 r. 1(1)(iii)(j) of RHC. As the prayers for declaratory orders or judgments against the 2nd defendant would also affect the rights or interest of the 1st defendant in respect of the PG, the 1st defendant was a necessary or proper party to this action. (paras 36-37 & 41-50)

(3) In relation to *forum conveniens*, the first stage of inquiry is to find which is the natural forum for trying the case. Once the natural forum is ascertained, as a general rule the case should be tried in the natural forum unless it should be tried more suitably for the interests of all parties and for the ends of justice. On the present facts, the prayers in the writ had real and substantial connection with Malaysia. Therefore, Malaysian Courts were the natural forum for trying the action. Although the law of contract was the law of Sudan, the decision of jurisdiction is quite different from the proper law of contract to be applied. Thus, the Malaysian Court was the appropriate forum to try the action and it would be unjust to compel the plaintiffs to sue in Sudan. (paras 60-62)

(4) The wording of s. 10 of the Arbitration Act 2005 as opposed to the use of the word 'may' in the old Arbitration Act 1952 makes it clear that a stay is mandatory unless certain exceptions apply, the onus of which falls on the plaintiffs. The 1st defendant had not taken any further step in the proceeding as they had applied promptly for a stay of the proceeding and they had made it abundantly clear that their application to set aside the ad-interim injunction was done without prejudice to

and subject to their application to set aside the service of the writ out of jurisdiction and to stay the proceeding in this court. (paras 73 & 76)

(5) There was no material and also no valid ground adduced by the 1st defendant to justify any disturbing or reversal of the learned judge's exercise of discretion in granting the ad interim injunction. On the surface at least, that there were serious questions for trial and even though they were not that serious, but nevertheless they could not be described as frivolous or vexatious. A more mature consideration of this issue of a serious question to be tried could be further had at the hearing at the *inter parte* stage. (para 77)

(6) The 1st defendant's application to set aside the writ and the service thereof outside the jurisdiction of the court was dismissed. The leave granted for service of the writ outside of the jurisdiction of the court was affirmed. The application to set aside the ad-interim injunction was dismissed. A stay of the proceedings was granted pending the reference to arbitration but the *inter parte* hearing on the injunction was to proceed on the next date fixed. The stay was subject to the plaintiffs paying interest at the rate of 3% per annum of the PG's sum of RM18 million. (paras 78-80)

Case(s) referred to:

American Cynamid v. Ethicon [1975] 2 WLR 316 ***(refd)***

American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 SC ***(refd)***

Arumugam Pillai v. Government of Malaysia [1980] 1 LNS 3 FC ***(refd)***

Boyle v. Sacker [1888] 34 Ch D 249 ***(refd)***

Busuk Jamilah Salim & 70 Ors v. Siti Fahfizah Mihaldin & Anor [2009] 1 LNS 1358 HC ***(refd)***

Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 SC ***(refd)***

Globus Shipping and Trading Co (Pte) Ltd v. Taiping Textiles Sdn Bhd [1976] 1 LNS 31 FC ***(refd)***

Henry v. Geoproso International [1975] 3 WLR 620 ***(refd)***

Innotec Asia Pacific Sdn Bhd v. Innotec GMBH [2007] 8 CLJ 304 HC ***(refd)***

Lim Cho Hock v. Government Of The State Of Perak, Menteri Besar, State Of Perak And President, Municipality Of Ipoh [1980] 1 LNS 43 HC ***(refd)***

Lubbe & Others v. Cape PLC [2000] 1 WLR 1545 ***(refd)***

Re Maria Menado [1964] 1 LNS 172 HC ***(refd)***

RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd [2002] 2 AMR 2457 ***(refd)***
Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 SC ***(refd)***

Legislation referred to:
Arbitration Act 1952, s. 6
Arbitration Act 2005, s. 10
Companies Act 1965, s. 176
Courts of Judicature Act 1964, s. 23(1)(a)
Rules of the High Court 1980, O. 11 r. 1(1)(iii)(h), (i), (j), O. 15 r. 16, O. 20 r. 1(1), O. 29

For the applicant/1st defendant - Kamraj Nayagam (Janice Tay with him); M/s Skrine & Co
For the respondents/plaintiffs - Tee Geok Hock (N Rajentharan with him); M/s GH Tee & Co
For the 2nd defendant - Sean Yeow; M/s Lee Hishamuddin Allen Gledhill

Reported by Amutha Suppayah

JUDGMENT

Lee Swee Seng JC:

Prologue

[1] The very mention of Darfur conjures up images of the ruins of war and the ravages of poverty; a region ripped apart by rival groups in a country called Sudan. There is money to be made there though not without its challenges as the parties here found it. The 2nd plaintiff, a subsidiary of a Malaysian public listed company ventured there where few would have the guts and gumption to tread. The project: the construction of a thousand kilometer pipeline and pumping facilities stretching from Darfur to Khartoum.

Parties

[2] The second plaintiff is a subsidiary of the first plaintiff. The first plaintiff is a public listed company listed with Bursa Malaysia and now under PN17. The second plaintiff entered into a contract with the 1st defendant to build, construct and commission a one thousand kilometer pipeline and pumping facilities for the passage of crude oil through it for an agreed contract sum of US$180 million under an 'Engineering, Procurement, Construction and Commissioning of Pumping Facilities Contract' (hereinafter referred

to as the Project) through the vehicle of a Joint-Venture company called Bentini-NF Energy JV; a Joint-Venture company between the second plaintiff and Bentini S.p.A.

[3] The first defendant is an off-shore company incorporated in British Virgin Islands and having its office in Khartoum. One can surmise that whoever control this company must have the special expertise and connections in Sudan to be able to secure such a contract.

[4] The second defendant is an off-shore bank in Labuan with a place of business in Kuala Lumpur.

[5] The first plaintiff had at the request of the second plaintiff provided the second defendant with the necessary security for the issuance of a Performance Guarantee ('PG') for US$18 million in favour of the first defendant. The Performance Guarantee was in the Standard Form prescribed in the contract. The security furnished by the first plaintiff in favour of the second defendant were a Fixed Deposit of RM20 million, a corporate guarantee and indemnity and a piece of land.

Problem

[6] The project was substantially completed though not without its complications and challenges. The complaint of the 2nd plaintiff was that there were repeated attempts to delay and drag the payments due to them from the 1st defendant. There was also the complaint that the 1st defendant had refused to approve any variation order even though those variations were at the orders of the 1st defendant. There were various negotiations where both parties stated their stand and staked their claims. Little wonder that when things came to the hilt the 1st defendant made a demand on the 2nd defendant to pay the sum of US$18 million under the PG.

[7] Characteristic of most construction disputes, the claims of the contractor for variation order and cost and expense were met by the principal's claim for liquidated and ascertained damages ('LAD') and cost of rectification as well besides calling upon payment under the PG which was procured at the commencement of the construction.

[8] The problem was further compounded by the fact of the parties having agreed that Sudan law shall be the applicable law governing the contract as well as the PG.

[9] The 1st defendant sent their representative to the 2nd defendant's office in Kuala Lumpur for a formal demand to be made.

Prayers

[10] The plaintiffs quickly filed a writ and statement of claim against the defendants in the Kuala Lumpur High Court on 9 April 2010. An amended writ and statement of claim made pursuant to O. 20 r. 1(1) Rules of the High Court (RHC) was filed on 13 April 2010. This was followed by an application for an injunction to restrain the 1st defendant from receiving the money under the PG and the 2nd defendant Bank from paying to the 1st defendant as beneficiary under the PG. Before the hearing of the *inter parte* injunction an *ex parte* injunction was granted to restrain the 1st defendant from receiving the money under the PG which order was made on 13 April 2010.

[11] On 15 April 2010 the plaintiffs obtained leave for (a) issue of notice of concurrent writ for service on the 1st defendant out of jurisdiction (see encl. 11), and (b) service of the *ex parte* injunction order dated 13 April 2010 and the related cause papers on the 1st defendant out of jurisdiction.

[12] The sealed order of *ex parte* injunction dated 13 April 2010 and the related cause papers were served on the 1st defendant on 29 April 2010. The 1st defendant filed a conditional appearance upon being served with the relevant court documents and applied for the leave granted to serve the writ out of jurisdiction to be set aside and also for a stay of proceeding pending reference to arbitration. At the hearing it was mutually agreed that the 1st defendant's application to set aside the service of the writ be heard first.

[13] The 1st defendant had notice of the issuance of the *ex parte* injunction as from mid – April 2010 and the 1st defendant was also notified that 3 May 2010 was *inter partes* hearing date.

[14] Meanwhile the *ex parte* interim injunction order dated 13 April 2010 and the amended writ and statement of claim were duly served on the 2nd defendant (a company incorporated and domiciled in Malaysia) on 13 April 2010.

[15] On 3 May 2010, (date for *inter partes* hearing), both the defendants were absent, and his Lordship Dr. Prasad Abraham re-scheduled the *inter partes* hearing to 3 June 2010, and granted an ad interim injunction to preserve the *status quo* until the disposal of

A the *inter partes* hearing of interim injunction which was further rescheduled to 16 June 2010 as both the defendants were absent on 3 June 10.

[16] On 15 June 2010, the 1st defendant filed and served:

B

(a) A summons-in-chambers dated 15 June 2010 (encl. 35) together with its supporting affidavit (encl. 34) applying to set aside the concurrent writ, the service of notice of concurrent writ on the 1st defendant and the Order dated 15 April 2010 which granted leave for service out of jurisdiction, or alternatively for stay pending arbitration; and

C

(b) An affidavit-in-reply affirmed on 15 June 2010 (encl. 33) to oppose the interim injunction application on the merits.

D **[17]** During the oral arguments on the 1st defendant's application counsel also argued that the ad-interim injunction granted should be set aside. For the avoidance of doubt the 1st defendant had followed through with a formal application filed the next day (encl. 43).

E

Principles

Issue: Whether 1st Defendant Has Submitted To The Jurisdiction Of The Court?

[18] Plaintiffs' counsel Mr Tee Geok Hock argued that the 1st F defendant had submitted to the jurisdiction of this Honourable Court, and the 1st defendant is therefore barred or disallowed from challenging the court's jurisdiction here.

[19] There seems to be some support for the proposition that G where a foreign defendant, by its act or conduct, has submitted to the jurisdiction of the court here, the foreign defendant is barred or disallowed from raising objection to jurisdiction.

[20] Plaintiffs' counsel referred the court's attention to the following cases:

H

Boyle v. Sacker [1888] 34 Ch. D. 249 (Court of Appeal, England):

I In the case, "an order was made for substituted service in England, of a writ and notice of motion for injunction, on a person resident abroad. He did not enter an appearance, but appeared by counsel on the motion for the injunction, filed affidavits and argued the case on the merits.

> The English Court of Appeal that the proper course for the defendant to have taken was to have applied at once to the judge to whose court the cause was attached to discharge the order for service, and that not having done so, but filed affidavits, appeared by counsel, and argued the case on the merits he could not complain of the order for service."

[21] In *Re Maria Menado* [1964] 1 LNS 172, Winslow J held (following Denning LJ) that if a foreign defendant took a step other than its objection to jurisdiction, he would have submitted to jurisdiction of the court. Winslow J cited with approval Lord Denning's dictum as follows:

> As Lord Denning said *In re Dulles' Settlement (No. 2)* –
>
> I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do anything, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all. *I quite agree, of course, that if he fights the case, not only on the jurisdiction, but also on the merits, he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits; and he cannot be allowed, at one and the same time, to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable.* But when he only appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction.

[22] In *Henry v. Geoproso International* [1975] 3 WLR 620 at p. 634 (English Court of Appeal), Roskill LJ (delivery judgment of English Court of Appeal) cited with approval the judgment of Sir Edmond Evershed MR that "where a question of jurisdiction arises a man cannot both have his cake and eat it. He cannot fight the issue on the merits, and at the same time preserve the right to say, if the worse comes to the worst, that the court has no jurisdiction to decide against him. And he cannot, consistent with that principle, take any step unequivocally referable to the issue on the merits". In *Henry*'s case, the English Court of Appeal held that at p. 621:

> since the defendants had voluntarily appeared before the Canadian Court to invite it not to exercise the discretion which it possessed under its own law to allow service out of the jurisdiction, they had

submitted to the jurisdiction of the Supreme Court of Alberta and were, accordingly, bound by the judgment for £16,819.06, which would be enforced against them.

[23] Further at p. 640 C to E of the judgment the English Court of Appeal held that:

> *where any issue arise for decision at any stage of the proceedings in the foreign court and that court is invited by the defendant as well as the plaintiff to decide those issues, "the merits" are voluntarily submitted to that court for decision* so that the submission that submission subsequently binds both parties in respect of the dispute as a whole, even if both would not have been so bound in the absence of that voluntary submission. Were that not so, the submission of a *preliminary issue (whether of fact or of law)* to a foreign court for decision would not be a voluntary submission to the jurisdiction of that court, and if a defendant lost on that issue he could nonetheless thereafter challenge the jurisdiction of that court to try the remaining issues – a proposition which we venture to think cannot be sustained.

[24] The plaintiffs' counsel contended that these decided authorities are to the effect that in respect of a foreign defendant's objection to jurisdiction, any filing of affidavit or presentation of argument on any preliminary issue or matter other than jurisdictional issue constitutes contesting on the merits and therefore submission to jurisdiction.

[25] Plaintiffs' counsel made a strong argument that by the following acts of positive affirmation, averments and arguments both written and oral, the 1st defendant had invariably and irrevocably submitted to the jurisdiction of this court:

(a) On 15 June 2010, the 1st defendant filed and served its affidavit-in-reply affirmed on 15 June 2010 (encl. 33) to argue the case on merits. Enclosure 33, contains the 1st defendant's arguments, averments, and/or contentions on the merits of interim injunction application;

(b) On 16 June 2010, the 1st defendant through its counsel orally applied to his Lordship Dr. Prasad Abraham JC to amend the terms of the Ad Interim Injunction by adding the words "and the parties be at liberty to apply" and, pursuant to such oral application, the court made an order on 16 June 2010 to allow the said amendment to the terms of the Ad Interim Injunction;

(c) On 16 June 2010, the 1st defendant through its counsel (pursuant to and taking advantage of the liberty to apply) orally applied to me to hear arguments and submissions relating to balance of convenience in relation to ad-interim Injunction, and pursuant to such application, I had fixed written submissions to be filed and exchanged on 22 June 2010 and fixed the hearing of oral submissions on 23 June 2010.

[26] It was pointed out that the 1st defendant's affidavit-in-reply of 15 June 2010 (encl. 33) contains averments, allegations and/or arguments on the merits of the interim injunction application. The 1st defendant's oral application to amend the terms of the ad-interim injunction was an invitation to the court to exercise its discretionary power to vary the terms of ad-interim injunction, and pursuant to such oral application, Yang Arif Dr. Prasad Abraham JC has exercised his discretionary power to amend the terms of the ad-interim injunction. The 1st defendant's oral application to the court to hear submissions on the issue of "balance of convenience" in respect of the ad-interim injunction was an act of taking the benefit of "liberty to apply" and also a further invitation to the court to hear part of the merits of the case insofar as it concerns ad-interim injunction which was then fixed for submissions to be filed, exchanged and heard.

[27] The plaintiffs contended that in the circumstances of the present case, the 1st defendant has submitted to the jurisdiction of this Honourable Court, and the 1st defendant cannot object to the jurisdiction of this Honourable Court anymore.

[28] It was further submitted that on this ground alone, the 1st defendant's jurisdictional objection should be dismissed with costs.

[29] In summary, the plaintiff's stand is that the 1st defendant had also submitted, succumbed and indeed surrendered to the jurisdiction of the court by filing affidavits to oppose and object to the grant of the ad-interim injunction. The 1st defendant had further participated in the proceedings by arguing against the granting if the ad-interim injunction. Having argued that the ad-interim ought to be discharged the 1st defendant cannot now argue that the court has no jurisdiction over the 1st defendant. In other words the 1st defendant ought to have resisted the temptation no matter how tantalising it may be to descend into the arena to argue on the merits or otherwise for the injunction applied for by the plaintiffs.

[30] Persuasive as that proposition is, I am not persuaded. I agree with the 1st defendant's counsel. Mr Kamraj Nayagam that the 1st defendant's affidavit (encl. 33) in objecting to the ad-interim injunction had clearly stated that the application is made without prejudice and subject to the 1st defendant's application to set aside the service of the writ out of jurisdiction. It is merely parrying a blow by the 1st defendant here. No prejudice has been suffered by the plaintiffs. The 1st defendant has not submitted, succumbed nor surrendered to the jurisdiction of the court merely because they have objected to the ad-interim injunction. There is no reason why one cannot object to that which one finds objectionable at the earliest opportunity and occasion especially when one has filed an application to set aside the service of the writ out of jurisdiction, thus not invoking the jurisdiction of the court but incidentally addressing the court on the jurisdiction issue. The 1st defendant cannot be said to have abandoned their aim of setting aside the service of the writ out of jurisdiction when they have expressly filed the application and argued the position. Neither can they be said to have affirmed and accepted the jurisdiction of the court merely because at the earliest opportunity they raise objection on the grant of the ad-interim injunction. By no stretch of the imagination can the 1st defendant be said to have invariably, irreversibly and irrevocably invoked the jurisdiction of the court.

[31] I am guided by and am bound by the decision of our Supreme Court in *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716 at p. 727 where Edgar Joseph Jr SCJ said:

> It will be recalled that in the view of the Judge the filing of affidavits by the Contractor seeking discharge of the *ex parte* interlocutory injunction and the taking of the preliminary objection before Anuar J challenging the jurisdiction of the Court to grant the same was "definitely a step in the proceedings" by the Contractor.
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> …
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> In our view, regard being had to the circumstances outlined above, the Judge ought to have held that the conduct of the Contractor did not indicate an election to abandon its right to a stay **nor did it have the effect of invoking the jurisdiction of the Court** and so the Contractor had not taken a step in the proceedings. (emphasis added).

Does The Malaysian Court Have Jurisdiction Over The Foreign Defendant In The 1st Defendant Here?

[32] The jurisdiction of the court over civil proceedings is provided under s. 23 of the Courts of Judicature Act 1964. Section 23(1)(a) provides:

> Subject to the limitations contained in art. 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
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> (a) the cause of action arose;
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> (b) the defendant or one of several defendants resides or has his place of business;
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> (c) the facts on which the proceedings are based exist or are alleged to have occurred;
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> (d) any land the ownership of which is disputed is situated,
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> within the local jurisdiction of the court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

[33] It is the 1st defendant's contention that the contract is performed in Sudan and subject to Sudanese law, In relation to any dispute on the PG, the parties have agreed that the PG shall be governed by and construed according to the laws of Sudan and the Surety agrees to submit to the non-exclusive jurisdiction of the courts in Sudan.

[34] The *locus classicus* on this point of jurisdiction over a foreign litigant is the case of *Globus Shipping and Trading Co (Pte) Ltd v. Taiping Textiles Sdn Bhd* [1976] 1 LNS 31; [1976] 2 MLJ 154 at p. 156 where the Federal Court held that:

> it would seem abundantly clear from the authorities that *where a cause of action in respect of any dispute in relation to a contract arises and is therefore properly within its jurisdiction, the court has a discretion whether or not to adjudicate upon the claim in the action even where the parties have agreed to refer such dispute to a foreign court, and that the question of jurisdiction is quite separate from the question of the proper law of the contract to be applied.* (emphasis added)

[35] On the principles in relation to parties' agreement to submit exclusively to the foreign jurisdiction, the Federal Court also held at pp. 155 to 156 as follows:

> As regards the general principles in relation to jurisdiction *where parties have agreed to submit exclusively to a foreign jurisdiction*, in the case of *The Fehmarn*[2] Wilmer J said at page 710:
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> > Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that that agreement should be over-ridden and that proceedings in this country should be allowed to continue. However, in the end it is, and must necessary be, a matter for the discretion of the court, having regard to all the circumstances of the particular case.
>
> In the same case when it went up to the Court of Appeal[7] Lord Denning said:
>
> > The next question is whether the action ought to be stayed because of the provision in the bill of lading that all disputes are to be judged by the Russian courts. I do not regard this provision as equal to an arbitration clause, but I do say that the English courts are in charge of their own proceedings: and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. Such a stipulation is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the over-riding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them.
>
> The above case was followed in the Singapore case of *Azimullah.*[1] In the case of *Evans Marshall & Co. Ltd v. Bertola S.A.*[3] the parties had agreed to the exclusive jurisdiction of the Spanish courts. The plaintiff brought an action in England and asked for leave to serve the writ out of jurisdiction. Leave was granted for the following reasons:
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> > On the assumption that clause 15 of the agreement was to be treated as an exclusive jurisdiction clause, leave should nevertheless be given to serve the writs on Bertola out of the jurisdiction under RSC Order 11 since there were exceptional circumstances justifying such a course: (a) the substance of the case concerned that marketing of sherry in the United Kingdom; (b) all the essential witnesses were within the jurisdiction; (c) Bertola were a proper and necessary party, within RSC Order 11, rule 1(j), to the

> plaintiffs' proceedings against ISI, which had nothing to do with the Barcelona Court, a state of affairs which had been brought about by Bertola's own actions in purporting to terminate the agency agreement and to appoint ISI instead; (d) the evidence disclosed that the relevant Spanish law did not differ from English law to any substantial extent. Accordingly it would, in all the circumstances, be unjust to allow Bertola to terminate the plaintiffs' agency in the United Kingdom and at the same time avoid the jurisdiction of the English courts.

On the question of whether or not the court should exercise its jurisdiction in the cases where the parties have agreed to refer any disputes to a foreign court, Brandon J in *The Eleftherid*[3] said:

> The principles established by the authorities can, I think, be summarized as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercise by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reason be unlikely to get a fair trial. (See also *Halsbury's Laws of England*, 4th Edition, Volume I, page 281, paragraph 440).

[36] I am also in agreement with the principle expressed in *American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273 at p. 280 where the Malaysian Court of Appeal held that

A if a defendant is not present here and has not submitted to jurisdiction, the Malaysian Court can have jurisdiction statutorily over a foreign defendant under O. 11 r. 1 of RHC 1980, as jurisdiction is implicit in the power to grant leave for service out of jurisdiction.

B

[37] In the present case, the plaintiffs relied on various limbs of O. 11 r. 1 of the RHC 1980 to apply for leave for service out of jurisdiction. At this stage I bear in mind the *dicta* of Peh Swee Chin SCJ that "A trial of merits of the case at this stage was C naturally out of the question so long as the statement of claim disclosed a reasonable cause of action": *American Express Bank Limited v. Mohamad Toufiq* [1995] 1 CLJ 273 at p. 280e.

[38] The plaintiffs through their counsel submitted as follows:

D The salient facts pleaded in the statement of claim (encl. 6) in so far as issue of jurisdiction is concerned, include:

(1) The subject-matter of this suit is a performance guarantee issued by the defendant in Kuala Lumpur, Malaysia (para. E 1.4 of statement of claim);

(2) The 2nd defendant is a Malaysian company having a place of business in Kuala Lumpur (para. 14 of statement of claim);

F (3) It was the 1st plaintiff, at the request of the 2nd plaintiff, who caused the 2nd defendant to issue the performance guarantee (para. 8 of statement of claim);

(4) The 1st defendant made a purported demand on the G performance bond in Kuala Lumpur (para. 39(5) of statement of claim);

(5) It is the plaintiff's case that the 1st defendant's purported demand was fraudulent or unconscionable (see para. 40(1) to (30) of statement of claim); H

(6) It is also the plaintiff's case that the 1st defendant had, by making the purported demand in calling upon the bond, committed a tort of fraud in the circumstances, and that the 2nd defendant owed a duty of care towards the plaintiffs to I ensure that any call made by the 1st defendant on the guarantee is not made fraudulently and/or unconscionably (para. 40, last sentence at p. 37).

(7) On or about 1 December 2009, the Contractor JV brought the fraud or unconscionability to the notice of the 2nd defendant (para. 41 of statement of claim).

(8) The 2nd defendant also had direct knowledge of two previous incident where the 1st defendant made purported demands on the previous guarantee for the ulterior motive or oppressive purpose of exerting pressure upon the 2nd defendant to immediately renew the guarantee (see para. 39(2) & (3) of statement of claim).

(9) The Shah Alam High Court restraining order dated 8 March 2010 was also brought to the attention of 2nd defendant, but the 2nd defendant did not appear to be bothered about the restraining order (para. 41 of statement of claim). This restraining order has been extended to 9 July 2010.

(10) It is the plaintiff's case that in the circumstances of this case, a demand or claim of the 1st defendant towards the guarantee would be fraudulent, unconscionable and/or invalid under the laws.

(11) It is also the plaintiffs case that the 1st defendant's demand or call on the guarantee is fraudulent, unconscionable and/or invalid in the circumstances of the project, and/or the demand is made as tool or means of oppression or vexation against the plaintiffs. Moreover, the 2nd defendant's act of paying under the circumstances would render it privy to the fraud and/or would be tainted by fraud and/or unconscionability. (para. 44 of statement of claims).

(12) The prayers and reliefs claimed in the amended writ and statement of claims include:

(a) A declaration that on the facts and circumstances of or pertaining to the project, the purported call or demand dated 8 April 2010 which was made by the 1st defendant on the Guarantee is fraudulent and/or unconscionable, and is therefore null and void;

(b) A declaration that on the facts and circumstances of the case, the 1st defendant's purported demand on the Guarantee was prohibited by the ad interim order dated 13 March 2010 and/or was in contempt of court or in contravention of the court order.

(c) An injunction to restrain the 1st defendant from calling or demanding on the Guarantee and/or further to restrain the 1st defendant from receiving any proceeds of monies under the Guarantee pursuant to the purported call or demand dated 8 April 2010;

(d) A declaration that the 2nd defendant, having been informed of the relevant facts and circumstances of the project which relate to the fraud or intended fraudulent demand on the part of the 1st defendant, would be party or privy to the fraud if the 2nd defendant were to make payment pursuant to the 1st defendant's demand;

(e) A declaration that the 2nd defendant, having been notified of the relevant facts and circumstances of the project which relate to the fraud or intended fraudulent demand on the part of the 1st defendant, would be acting unlawfully or improperly or *mala fide* if the 2nd defendant were to make payment pursuant to the 1st defendant's demand and that in such event the 2nd defendant would not be entitled to recover the payment or any part thereof from the plaintiff;

(f) A declaration that the 2nd defendant, having been informed of the ad interim order dated 18 March 2010, would be acting in contempt or court or in contravention of the said court order if the 2nd defendant were to proceed to make payment pursuant to the 1st defendant's demand and that in such event the 2nd defendant would not be entitled to recover the payment or any part thereof from the plaintiff;

(see para. 52(1) to (6) of statement of claim)

[39] In the present case, the plaintiffs rely on *inter alia* O. 11 r. 1(1)(iii)(h), (i), and/or (j) of RHC 1980. It appears that the various grounds under O. 11 r. 1 are to be read disjunctively.

Order 11 r. 1(1)(iii)(i): Injunction

[40] Order 11 r. 1(1)(iii)(i) permits service out of jurisdiction "if in the action begun by the writ an injunction is sought ordering the defendant to do or **refrain from doing anything within the jurisdiction** (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);" (emphasis added)

[41] The plaintiffs' present action is begun by writ (see encl. 1). In this action begun by writ, an injunction is sought ordering the defendant to refrain from doing anything within the jurisdiction, namely to refrain from receiving the money demanded in respect of the performance guarantee (see prayer (3)) in the amended writ: encl. 6. The money is now with the 2nd defendant bank in Malaysia.

[42] I agree with the plaintiffs' counsel that in the circumstances the present action falls within O. 11 r. 1(1)(iii)(i) of the RHC 1980, and is a proper case for service out of jurisdiction.

Order 11 r. 1(1)(iii)(h): Tort

[43] Order 11 r. 1(1)(iii)(h) permits service of writ out of jurisdiction "if the action begun by the writ is founded on a tort committed within the jurisdiction." In *American Express v. Mohamad Taufiq (supra)*, the Supreme Court held that fraudulent misrepresentation is a tort, and that although the appellant was not present within jurisdiction and had not submitted to the jurisdiction of the Malaysian Court, the Malaysian Court has jurisdiction as the case was cast in tort committed in Malaysia.

[44] The Sudanese lawyer's legal opinion on laws of Sudan includes a statement that if a party has not suffered any actual loss but makes a demand on the performance guarantee, such demand can be considered as cheating (see encl. 3A, Jilid 2 pp. 306 and 308-309 Answer to Question 3).

[45] One of the prayers in the writ is for declaration that on the facts and circumstances the 1st defendant's demand dated 8 April 2010 "adalah penipuan" (fraudulent) "dan/atau tidak wajar" (inconsionable) (See prayer (1) in the writ encl. 1).

[46] The 1st defendant's purported demand dated 8 April 2010 was made in Malaysia (see para. 395(5a) of plaintiff's affidavit-in-support, encl. 3A and exh. PA-14D at p. 1524g of vol. 7). The purported demand is against the 2nd defendant in Malaysia and in respect of the Guarantee issued in Malaysia. The purported demand also required the payment of demanded money to be paid through Malaysian bank by telegraphic transfer. In the circumstances, the plaintiffs' case of fraudulent demand is cast as a tort committed within the jurisdiction, and the Malaysian Court has jurisdiction under O. 11 r. 1(1)(iii)(h) of RHC 1980.

[47] The court at this stage is not required to go into the merits of the plaintiffs' claim. So long as it is plausible and not inherently incredible, the threshold test on jurisdiction would have been satisfied.

Order 11 r. 1(1)(iii)(j): Co-Defendant

[48] Order 11 r. 1(1)(iii)(j) permits service of writ out of jurisdiction:

> if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto;

[49] In the present action begun by writ, the plaintiff claimed for three declaratory orders and/or reliefs against the 2nd defendant, namely:

> (4) A declaration that the 2nd defendant, having been informed of the relevant facts and circumstances of the project which relate to the fraud or intended fraudulent demand on the part of the 1st Defendant, would be party or privy to the fraud if the 2nd Defendant were to make payment pursuant to the 1st Defendant's demand;
>
> (5) A declaration that the 2nd Defendant, having been notified of the relevant facts and circumstances of the Project which relate to the fraud or intended fraudulent demand on the part of the 1st Defendant, would be acting unlawfully or improperly or *mala fide* if the 2nd Defendant were to make payment pursuant to the 1st Defendant's demand and that in such event the 2nd Defendant would not be entitled to recover the payment or any part thereof from the Plaintiff;
>
> (6) A declaration that the 2nd Defendant, having been informed of the ad interim order dated 18th March 2010, would be acting in contempt or court or in contravention of the said court order if the 2nd Defendant were to proceed to make payment pursuant to the 1st Defendant's demand and that in such event the 2nd Defendant would not be entitled to recover the payment or any part thereof from the Plaintiff;
>
> (see paragraph 52 of Amended Statement of Claim – Enclosure 6)

[50] I agree that O. 15 r. 16 of RHC 1980 is very wide in its ambit where it provides as follows:

No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

[51] The extremely wide powers of the Malaysian Court to grant declaratory orders or judgment is judicially recognized by many cases, including Eusoffe Abdoolcader J's judgment in *Lim Cho Hock v. Government Of The State Of Perak, Menteri Besar, State Of Perak And President, Municipality Of Ipoh* [1980] 1 LNS 43; [1980] 1 MLJ 148 (see p. 151, LHS paras C, G to I).

[52] In *Arumugam Pillai v. Government of Malaysia* [1980] 1 LNS 3; [1980] 2 MLJ 283, the Federal Court recognized declarations as valid causes of action (p. 287, LHS paras A to C).

[53] In the circumstances, the plaintiffs have plausible causes of action for declaratory judgments or orders against the 2nd defendant, a Malaysian company. The court is not at this stage required to go into a detailed analysis of the strength or otherwise of the plaintiffs' claims. As the 1st defendant has made a purported demand on the guarantee issued by the 2nd defendant, and this demand is disputed by the plaintiffs and/or the notice of fraud was brought to the 2nd defendant's notice, the questions in the declarations prayed for are real and substantial questions, and are not theoretical.

[54] In the circumstances, this action may be brought against the 2nd defendant, a Malaysian company. The 2nd defendant has entered an appearance and they have not filed any application to strike out the plaintiffs' claim.

[55] The amended writ and statement of claim were duly served on the 2nd defendant on 13 April 2010 (see para. 1.3 above), two (2) days before the plaintiff's applied on 15 April 2010 for leave for service out of jurisdiction.

[56] As the prayers for declaratory orders or judgments against the 2nd defendant would also affect the rights or interest of the 1st defendant in respect of the guarantee, the 1st defendant is a necessary or proper party to this action.

[57] I agree that in the premises, this action falls within O. 11 r. 1(1)(iii)(j) of RHC and the Malaysian court has jurisdiction.

A **Whether The Malaysian Court Is The Proper Forum To Adjudicate The Dispute Based On The Test Of *Forum Non Conveniens***

[58] Plaintiffs' counsel submitted that the Latin maxim of *forum*
B *non conveniens* refers to suitability or appropriateness, and not convenience in the English Language: *American Express Bank Ltd v. Mohamad Taufiq (supra)* at p. 281b. The fundamental principle in regard to this doctrine ie, there is some other tribunal, having competent jurisdiction, in which the case can be tried more suitably
C for the interests of all parties and for the ends of justice: p. 281 para. 9 in *American Express Bank Ltd v. Mohamad Toufiq*.

[59] The first stage of inquiry is to find which is the natural forum for trying the case. Once the natural forum is ascertained, as a general rule the case should be tried in the natural forum unless
D it should be tried more suitably for the interests of all parties and for the ends of justice (pursuant to the second stage of the inquiry).

[60] The plaintiffs' counsel submitted that in the present case, the performance guarantee was issued in Kuala Lumpur by a Malaysian
E company having a place of business in Kuala Lumpur. The guarantee money sought to be restrained by injunction is now in Malaysia. The demand for the guarantee money was made in Kuala Lumpur. The notice of fraud was brought to the 2nd defendant's attention in Kuala Lumpur. The collateral security for the issuance
F of the performance guarantee is held by the 2nd defendant in Malaysia. The restraining order of Shah Alam High Court (which restrains any enforcement of security issued or provided by the plaintiffs) was also issued in Malaysia. The 2nd defendant is a Malaysian company. In the circumstances, the prayers in the
G Amended Writ have real and substantial connection with Kuala Lumpur, Malaysia. Therefore, Malaysian Court is the natural forum for trying this action.

[61] In the present case, although the law of contract is the law
H of Sudan, the decision of jurisdiction is quite different from the proper law of contract to be applied: see Federal Court's decision in *Globus Shipping v. Taiping Textile*. In *Globus Shipping v. Taiping Textile*, the applicable law of contract was foreign law and the contracting parties agreed to submit to the exclusive jurisdiction of
I a foreign court, yet the Federal Court has that the Malaysia Court was right in exercising jurisdiction to try the action here.

[62] In the present case the plaintiffs' counsel submitted that: A

(a) As between 1st plaintiff and 2nd defendant there is no agreement on choice of law or on submission to foreign jurisdiction; and

(b) As between the 2nd plaintiff and 1st defendant, there was agreement to submit to non-exclusive jurisdiction of Sudanese Court, but there is no agreement to submit to exclusive jurisdiction of any court. B

[63] Even if the parties agreed to submit exclusive jurisdiction of a foreign court, the Malaysian court still has discretion to adjudicate the action. See the case of *Globus Shipping v. Taiping Textile.* In *Globus Shipping (supra)*. C

[64] It was submitted by the plaintiffs' counsel that the following should weigh upon the court with respect to its determination on the proper forum: D

(a) The guarantee (subject-matter of this action) was issued in Malaysia by the 2nd defendant, a Malaysia company;

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(b) The demand on the guarantee was made in Malaysia;

(c) The guarantee money sought to be restrained is within Malaysia;

(d) The 2nd defendant's witness(es) are in Malaysia and most of the plaintiff's witnesses are in Malaysia; F

(e) The plaintiffs' witnesses do not want to go to Sudan to give evidence due to security and/or safety reasons;

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(f) Sudan went through civil wars in recent years with less of about 2 million civilian lives and is described by UN as being unable to protect the life and property of its citizens;

(g) The Guarantee money by its nature can be dissipated or transferred very quickly, and in Sudan, there is no equivalent of our RHC 1980 O. 29 procedure for preservation of *status quo* in urgent cases. To require the plaintiffs to go to Sudan Courts would cause injustice in that the very subject-matter would become academic there: H

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Sudanese Courts require all documents to be filed and used in Sudanese Courts must be translated into Arabic language. As the project documents in this case are in English, such requirement of translation would involve much time and costs and also loss of accuracy. When the 1st defendant made a demand on the guarantee on 8 April 2010, the 2nd defendant was about to make payment within several days. There was simply not enough time to go to Sudan to file any injunction case there, as translation would take much longer time and booking a flight to go there would take about one week, by which time the guarantee money would already be released and any injunction suit would have become academic:

(h) Although the applicable law of contract is the Sudanese law, the Sudanese law of contract is not very different from Malaysian law of contract, and the Sharia principle applicable to Sudan are very similar to Syariah principles applicable in Malaysia and also similar to equitable principles applied by the Malaysian Civil Courts. The Malaysia civil courts also handle civil cases involving Syariah principles, including banking cases on Syariah loans and facilities. From the Sudanese lawyers' legal opinion, the Sudanese law applicable to this action are clear, and can be readily applied by Malaysian Court in this action.

[65] In the circumstances of this case, the plaintiffs' counsel submitted that Malaysia Court is the suitable or appropriate forum to try this action and that it would be unjust to compel the plaintiffs to sue in Sudan.

[66] Plaintiffs' counsel referred to *Lubbe & Others v. Cape PLC* [2000] 1 WLR 1545 (English House of Lords decision) where it was stated:

> In 1997 in a number of actions begun in England the Plaintiffs, who were almost all South African citizens resident in South Africa, claimed damages for personal injury, and in some cases death, against the defendant, a company registered in England which owned a number of subsidiary companies in South Africa engaged in the mining and processing of asbestos and the sale of asbestos-related products. The Plaintiffs alleged that, in respect of periods before 1979, the defendant, while knowing of the injurious effect of exposure to asbestos, had failed, as the parent company, to take appropriate steps to ensure the adoption of proper working practices and safety precautions throughout its subsidiary companies

and had thereby acted in breach of a duty of care it owed to employees of its subsidiary companies or to those living in the area of their operations.

Thereafter writs in nine further actions were issued by more than 3,000 plaintiffs, South African citizens resident in South Africa, who made similar allegations against the defendant. Those cases were ordered to proceed as a group action. The defendant applied for a stay of all proceedings against it.

[67] The House of Lord unanimously held that:

(1) Where a plaintiff sued a defendant as of right in the English court the defendant's application for a stay on the ground of *forum non conveniens* could not succeed unless the court was satisfied that there was another tribunal of competent jurisdiction in which the case might be tried more suitably for the interests of all the parties and for the ends of justice;

And on the facts, it was open to the court to conclude that South Africa was not clearly the appropriate forum;

(2) As regards the nine further actions, both the judge on the second stay application and the second Court of Appeal had correctly regarded South Africa as clearly the more appropriate forum; but that since the proceedings could only be handled efficiently, cost-effectively and expeditiously on a group basis, since the preparation and conduct of the personal injury issue, was a heavy and difficult task requiring the services or supervision of professional lawyers and the obtaining of expert advice and evidence, and since no convincing evidence suggested the availability of appropriate funding in South Africa, whether by legal aid, contingency fee arrangements or otherwise, the probable effect of a stay would be to deprive the plaintiffs of the means of obtaining the representation and evidence essential to the just disposal of their claims, and in consequence would amount to a denial of justice; and that, accordingly, in the unusual circumstances of the proceedings, lack of means in South Africa to prosecute the claims required the stay to be refused (p. 1546, held (2))

(3) That the principles applied by the court on an application for a stay on the ground of *forum non conveniens* required it to exercise jurisdiction where a plaintiff sued the defendant as of right in England unless it was satisfied that the case might be tried in the other forum more suitably for the interests of all

A the parties and the ends of justice; and that, accordingly, considerations of public interest and public policy which did not relate to the private interest of any the parties and to securing the ends of justice in the particular case should be left out of account in determining the application

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[68] Lord Bingham, in his judgment to which the other law lords concurred, stated the principle of stay on ground of *forum non conveniens* as follows:

In the *Spiliada* case [1987] AC 460, 476 it was stated:

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The basic principle is *that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie, in which the case may be tried more suitably for the interests of all the parties and the ends of justice.*

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In applying this principle the Court's first task is to consider whether the defendant who seeks a stay is able to discharge the burden resting upon him not to show that England is not natural or appropriate forum for the trial but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is had to the fact that jurisdiction has been founded in England as of right; see the *Spiliada* case, at p. 477. At this first stage of the inquiry the court will consider what factors there are which point in the direction of another forum: see the *Spiliada* case [1987] AC 460, 477; *Connelly v. R.T.Z. Corporation Plc.* [1998] AC 854, 871. *If the court concludes at that stage there is no other available forum which is clearly more appropriate for the trial of the action, that is likely to be the end of the matter. But if the court concludes at that stage that there is some other available forum which prima facie is more appropriate for the trial of the action it will ordinary grant a stay unless the Plaintiff can show that there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.* In this second stage the Court will concentrate its attention not only on factors connecting the proceedings with the foreign or the English forum (the *Spiliada* case, at p. 478; the *Connelly* case, at p. 872) but on *whether the plaintiff will obtain justice in the foreign jurisdiction.* The plaintiff will not ordinarily discharge the burden lying upon him by showing that he will enjoy procedural advantages, or a higher scale of damages or more generous rules of limitation if he sues in England; generally speaking, the plaintiff must take a foreign forum as he finds it, even if it in some respects less advantageous to him than the English forum (the *Spiliada* case, at 482; the *Connelly* case, at p. 8720. It is only if the plaintiff can be establish that substantial justice will not

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be done in the appropriate forum that a stay will be refused (the *Spiliada* case, p. 482; the *Connelly* case, at p. 873). (see page 1554 of Tab 12: *Lubbe & Others v. Cape PLC*).

Lord Bingham agreed with Lord Hope that public interest considerations not related to the private interests of the parties and the ends of justice have no hearing on the decision which the Court has to make (page 1561 E).

[69] On the irrelevance of public interest to the question of exercise of jurisdiction, Lord Hope in its judgment at pp. 1566 to 1567 stated the principles as follows:

Public Interest

In my opinion *the principles on which the doctrine of forum non conveniens rest leave no room for considerations of public interest or public policy which cannot be related to the private interests of any of the parties or the ends of justice in the case which is before the court.*

In *Societe du Gaz de Paris v. Societe Anonyme de Navigation "Les Armateurs Francais"* [1925] SC 332, 361, where jurisdiction was established over the defendant by an arrestment to found jurisdiction, Lord Anderson rejected the extreme argument that that case ought not to be litigated in Scotland at all as it was action between foreigners. He said:

> Anyone who succeeds in founding jurisdiction in this way seems to me to be entitled, as of right, to invoke the exercise of the jurisdiction so founded, the court can only refuse to exercise the jurisdiction invoked if a defence of *forum non conveniens* is established.

In the House of Lords [1926] SC (HL) 12, 21 Lord Sumner was alluding to the same point when he said:

> *Obviously the court cannot allege its own business, or its distaste for trying actions which involve taking evidence in French, as a ground for refusal* … the court has to proceed until the defender objects, but, as against the pursuer's right, the defender has an equal right to plead *forum non conveniens*.

In *Macshannon v. Rockware Glass Ltd* [1978] AC 795, 822D, Lord Salmon said that he did not think that matters of general policy should play any part in deciding issues of this kind, and Lord Keith of Kinkel made an observation to the same effect, at p. 833D.

The proper approach therefore is to start the proposition that a claimant who is able to established jurisdiction against the defendant as of right in this country is entitled to call upon the court of this

country to exercise that jurisdiction. *So, if the plea of forum non conveniens cannot be sustained on the ground that the case may be tried more suitably in the other forum*, in the words of Lord Kinnear in *Sim v. Robinow* 19 R. 665, 668, "*for the interest of all the parties and for the ends of justice," the jurisdiction must be exercised – however desirable it may be on grounds of public interest or public policy that the litigation should be conducted elsewhere and not in the English court*. On the other hand, if interests of all parties and the ends of justice require that the action in this country should be stayed, a stay ought to be granted however desirable it may be on grounds of public interests or public policy that the action should be tried here.

I would therefore decline to follow those judges in the United States who decide issues as to where a case ought to be tried on broad grounds of public policy; see Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984 [1986] 634 F. Supp. 842 and *Piper Aircraft Co. v. Reyno* [1981] 454 US 235. I respectfully agree with Deane J's observation in *Oceanic Sun Line Special Shipping Co. Inc v. Fay* [1988] 165 CLR 197, 255 that *the court is not equipped to conduct the kind of inquiry and assessment of the international as well as the domestic implications that would be needed to give effect to concerns about the expense and inconveniences to the administration of justice of litigating actions such as these in this country on the one hand or inn South Africa on the other, the argument must be resolved upon an examination of their effect upon the interests of the parties who are before the court and securing the ends of justice in their case.* I would hold that considerations of policy which cannot be dealt with in this way should be left out of account in the application to the case of the Spiliada principles.

In *Lubbe & Others v. Cape PLC*, the plaintiff's were South African citizens resident in South Africa, the complaints of injurious effects of exposure to asbestos related to the defendant's subsidiary companies' mining and processing operations in South Africa. Yet the House of Lords held that South African Court was not a tribunal of competent jurisdiction in which the case might be tried more suitably for the interests of all the parties and for the ends of justice.

[70] In the premises, for the interests of all parties and for the ends of justice, I agree that this action should be tried in the Malaysian Court.

Whether The Present Proceeding Should Be Stayed Pending The Reference To Arbitration?

[71] The 1st defendant's counsel submitted that if this court is not minded to grant the first defendant's application to set aside, a stay should be granted pursuant to s. 10 of the Arbitration Act 2005 which provides as follows:

10. Arbitration agreement and substantive claim before court

(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement **shall,** where a party makes an application **before taking any other steps in the proceedings, stay those proceedings** and refer the parties to arbitration unless it finds:

(a) that the agreement is null and void, inoperative or incapable of being performed; or

(b) that there is in fact no dispute between the parties with regard to the matters to be referred.

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court. (emphasis added)

[72] The wording of s. 10 of the Arbitration Act 2005 as opposed to the use of the word 'may' in the old Arbitration Act 1952 makes it clear that a stay is mandatory unless certain exceptions apply, the onus of which falls on the plaintiffs. The old Arbitration Act 1952, s. 6 reads as follows:

If any party an arbitration agreement or any person claiming though or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, **before taking any other steps in the proceedings,** apply to the court to stay to proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, **may make an order staying the proceedings.** (emphasis added)

[73] In support of this proposition, the 1st defendant's counsel referred to *Innotec Asia Pacific Sdn Bhd v. Innotec GMBH* [2007] 8 CLJ 304 (HC) where it was held:

Mandatory Stay: s. 10, Arbitration Act 2005

[41] The Arbitration Act 2005 (the new Act) came into force on 15 March 2005. The power of the court to grant a stay of proceedings is as provided under s. 10 of the Act. Pursuant to this new provision, the general discretion vested in the court to stay court proceedings is no longer available. Instead, the requirement to stay is mandatory, on an application by a party before taking any other steps in the proceedings, unless the court finds either that:

(a) the agreement is null and void, inoperative or incapable of being performed; or

(b) there is in fact no dispute between the parties with regard to the matters to be referred.

[74] In *Busuk Jamilah Salim & 70 Ors v. Siti Fahfizah Mihaldin & Anor* [2009] 1 LNS 1358 (HC) it was held:

The onus is on the plaintiffs to show that either paragraph (a) or (b) (the statutory exceptions) applies ...

In *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd* [1991] 1 CLJ 362 (Rep); [1991] 3 CLJ 2400; [1991] 3 MLJ 309 the Supreme Court said at page 312: It is also a well-settled principle that where parties have agreed to refer disputes for arbitration and the court is satisfied that a dispute exists, but one of the parties to the contract commences an action to have the matter determined by the court the *prima facie* stand of the court is to stay the action and allow the parties to go to the tribunal to which they have agreed. In other words once the party applies for a stay and there is a dispute within the meaning of a valid and subsisting arbitration clause the inclination of the court is that effect should be given to the arbitration clause.

[75] I am fortified in my view that the 1st defendant has not taken any further step in the proceeding as they have applied promptly for a stay of the proceeding and they have made it abundantly clear that their application to set aside the ad-interim injunction is done without prejudice to and subject to their application to set aside the service of the writ out of jurisdiction and to stay the proceeding in this court. As was stated in *Seloga Jaya Sdn Bhd (supra)*, resisting an application for an interlocutory injunction by putting in evidence in affidavit form and through counsel, appearing in court to argue against the injunction cannot amount to 'taking any other steps in the proceeding'. Otherwise the 1st defendant would be in a Catch-22 situation. If he objects to the injunction he is damned because that could be construed as taking a further step in the proceeding by way of filing an affidavit to set

aside the injunction. If he does nothing to set aside the injunction the injunction will continue to be in force by default if not by design of the plaintiffs. It is a case of head I win and tail you lose! That cannot be the position of the law. Indeed there is a palpable paradigm shift in the Arbitration Act 2005 towards affirming parties agreement to go for arbitration and the court will only refuse the parties intention if the defendant can be shown to have so irreversibly and irrevocably taken positive further steps in the proceeding that one can affirmatively, assuredly and avowedly say that the defendant has abandoned its intention to arbitrate altogether.

Balance Of Convenience In Respect Of Setting Aside An Ad-interim Injunction

[76] The court's power to grant ad interim injunction was clearly established: see Court of Appeal's decision in *RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd* [2002] 3 CLJ 83. According to the Court of Appeal, ad-interim injunction is granted to preserve the *status quo* after the expiry of the *ex parte* order until the *inter parte* hearing of the injunction application. Abdul Hamid Mohamad JCA (later CJ) held:

> From my experience, quite often parties would agree to such an order or the defendant would give an undertaking to maintain the *status quo* pending the hearing of the application *inter partes*. But even if they do not agree, the Court has the jurisdiction to make such an order. (page 91).

[77] In the present case, Yang Arif Dr. Prasad Abraham exercised his discretion to grant ad interim injunction to preserve the *status quo* until the disposal of the inter partes hearing. There is no material and also no valid ground adduced by the 1st defendant to justify any disturbing or reversal of the learned judge's exercise of discretion.

[78] The plaintiffs' counsel submitted that the ad-interim injunction should continue, and balance of convenience is not a relevant criterion in respect of ad-interim injunction; in the circumstances here, there is no valid ground for disturbing the ad interim injunction.

[79] Following the Supreme Court case of *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283; [1995] 1 MLJ 149 at p. 158-159, and applying *American Cynamid v. Ethicon* [1975] 2 WLR 316, without the need to ascertain in a kind of detailed

A analysis the respective strength of the parties herein at this application to set aside the ad-interim injunction stage, I am satisfied that on the surface at least, that there are serious questions for trial and even though they were not that serious, but nevertheless they could not be described as frivolous or vexatious. A
B more mature consideration of this issue of a serious question to be tried can be further had at the hearing at the *inter parte* stage.

[80] I am of the view that at this stage of setting aside the ad-interim injunction and pending the hearing of the *inter parte*
C injunction the balance of convenience would have been more than achieved if the plaintiffs were to pay to the 1st defendant's solicitors the interests that could be earned on the sum of US$18 million so that at most, the only disadvantage to the 1st defendant is a postponement of their receipt of the sum of US$18 million under
D the PG until the hearing of the *inter parte* injunction. As the 1st plaintiff is under PN17 and there is a current restructuring plan afoot under a s. 176 scheme under the Companies Act 1965, the 1st defendant cannot be blamed for being anxious about the 1st plaintiff financial standing which can be allayed by the payment of
E interest periodically.

Pronouncement

[81] In the upshot, I dismissed the 1st defendant's application to set aside the writ and the service thereof outside the jurisdiction of
F this court. I affirm that the leave granted for service of the writ outside of the jurisdiction of this court was properly given and that this court has jurisdiction over the 1st defendant to hear the matter.

[82] The application to set aside the ad-interim injunction is
G hereby dismissed.

[83] I also granted a stay of the current proceeding pending the reference to arbitration but the *inter parte* hearing on the injunction will proceed on the next date fixed. The stay is subject to the
H plaintiffs paying interest at the rate of 3% per annum of the PG's sum of RM18 million every quarter by the 30th day of the commencement of each quarter to the 1st defendant's solicitors clients' account earning interest and the first quarter shall commence on 1 July 2010. In the event interest is not so paid the
I ad-interim injunction, granted shall be dissolved automatically. The above is an unless order. As each party has partially succeeded in their arguments, no order as to costs is made.